

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**ROLAND H. SPENCE, JR., DBA
SPENCE TOURS,**

Respondent.

**Docket No. FMCSA-2007-0099¹
(Eastern Service Center)**

FINAL ORDER

1. Background

On September 28, 2007, the Delaware Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Roland H. Spence, Jr., dba Spence Tours (Respondent) following a compliance review of Respondent conducted on August 27, 2007.² The NOC charged Respondent with one violation of 49 CFR 382.305(a), failing to implement a random controlled substance and/or alcohol testing program, with a proposed civil penalty of \$1,280; and one violation of 49 CFR 395.8(i), failing to require a driver to forward the original of the record of duty status within 13 days of completion, with a proposed civil penalty of \$720. The NOC proposed a total civil penalty of \$2,000.

Respondent replied to the NOC on October 27, 2007.³ He did not address the alleged drug and alcohol testing violation, but contested the § 395.8(i) charge. He

¹ The previous case number was DE-2007-0058-US0222.

² Exhibit A to Motion for Default and Final Agency Order (hereafter Motion for Default).

³ Exhibit B to Motion for Default.

claimed that he could not produce the March 15, 2007 record of duty status—the basis for this violation—because he discovered, the night before the compliance review, that his car had been ransacked and all records of duty status for the year 2007 had been stolen. Respondent also claimed that § 395.8(i) was inapplicable to him because, as owner and sole driver of the motor carrier, there is no need for him to forward records of duty status to himself. Respondent requested administrative adjudication but failed to specify whether he wanted an informal or formal hearing or whether he intended to submit written evidence without a hearing.⁴

On December 19, 2007, the Field Administrator for the FMCSA's Eastern Service Center (Claimant) moved for entry of an order of default declaring the NOC, including the civil penalty, as the final order in the proceeding. Claimant argued that Respondent should be found in default because he essentially admitted both violations and his reply was so deficient as to constitute no reply at all. Respondent did not reply to the Motion.

2. Decision

Section 386.14(b) of the Agency's Rules of Practice requires a respondent, in replying to an NOC, to either pay the full amount of the claim, contest the claim by requesting administrative adjudication or seek binding arbitration regarding the proposed civil penalty. Although Respondent requested administrative adjudication, he failed to state the grounds for contesting the § 382.305(a) violation or raise any affirmative defenses, as required by § 386.14(d)(1). According to that section, "[a]ny allegation in the claim not specifically denied in the reply is deemed admitted. A mere general denial of the claim is insufficient and may result in a default being entered by the Agency

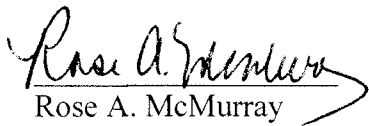
⁴ See 49 CFR 386.14(d)(1)(iii).

decisionmaker upon motion by the Field Administrator.” Because Respondent’s reply did not deny the § 382.305(a) charge, he admitted it. Once a respondent has admitted violations for which he is charged, he should choose to either pay the full amount of the civil penalty or seek binding arbitration on the amount of the civil penalty and/or the length of time in which to pay it.⁵ Because Respondent chose neither option, Claimant’s Motion for Default will be granted with respect to the § 382.305(a) violation.

Respondent, however, did deny the § 395.8(i) charge, offering the affirmative defense that as both the sole owner and sole driver for the company, he would have necessarily furnished the records of duty status to the motor carrier once he completed them. Although Claimant correctly noted that Respondent did not elect a particular form of administrative adjudication, I am not granting the Motion for Default with respect to this count because the alleged violation was improperly charged. Section 395.8(i) implicitly assumes that records of duty status are prepared by the driver but not furnished to the carrier in a timely fashion. That being the case, when the carrier and the driver are one and the same, the records would be furnished to the carrier at the time of completion. Therefore, Respondent could not have violated § 395.8(i). If anything, Respondent’s failure to produce the record of duty status for March 15, 2007 appears to be a violation of 49 CFR 395.8(k)(1), which requires motor carriers to maintain records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt. However, Respondent was not charged with violating § 395.8(k)(1). Accordingly, the Motion for Default is denied with respect to the § 395.8(i) charge.

⁵ See *In the Matter of Archie Palmer*, Docket No. FMCSA-2007-26787, Final Order, May 11, 2007. Respondent did not challenge the amount of the civil penalty.

THEREFORE, *It Is Hereby Ordered That*, Respondent pay to the Field Administrator for the Eastern Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$1,280 for one violation of the Federal Motor Carrier Safety Regulations. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.⁶



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

6-29-10
Date

⁶ Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

CERTIFICATE OF SERVICE

This is to certify that on this 1 day of July, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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